90-1810

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

JAMES F. HICKEY,

Petitioner,

v.

THE STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SUPREME COURT OF THE STATE OF CONNECTICUT

JAMES F. HICKEY
Petitioner
72 Russ Street
Hartford, CT 06106
(203) 278-2651

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QUESTIONS PRESENTED

1. Where the sole evidence against a criminal defendant is the testimony of a complainant, does the Sixth Amendment of the United States Constitution require the State to allege the date the defendant was to have committed the charged offense?

2. Where evidence of prior uncharged crimes is admitted without any stated purpose, is a criminal defendant entitled to a limiting instruction, *sua sponte?*

3. Where evidence of a criminal defendant's commission of uncharged crimes is admitted without a limiting instruction, upon rereading the evidence to the jury is the defendant entitled to a limiting instruction which specifies the purpose for which said evidence may and may not be considered?

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OFFICIAL OPINIONS BELOW

The official opinion of the Appellate Court of the State of Connecticut in the case of *State of Connecticut v. James F. Hickey* is reported at 23 Conn. App. 712 (1991).

The official decree of the Supreme Court of the State of Connecticut denying certification is reported at 217 Conn. 809 (1991).

Both decisions are reprinted in the Appendix attached hereto.

JURISDICTIONAL STATEMENT

1. The petitioner seeks review of the denial of certification from the Supreme Court of the State of Connecticut dated February 5, 1991.

2. Petitioner submits that 28 U.S.C. 1257 and Rule 10.1(b) of the Rules of the Supreme Court confer jurisdiction on this Court to review the decree of the Supreme Court of the State of Connecticut denying certification to the petitioner.

CITATION OF APPLICABLE PROVISIONS

1. The Sixth Amendment to the United States Constitution.

2. Rule 404(b) of the Federal Rules of Evidence.

The above provisions are reprinted in their entirety in the Appendix.

STATEMENT OF THE CASE

After a jury trial in the Superior Court of the State of Connecticut, in the Judicial District of Hartford, Geographical Area of Manchester, Petitioner, James F. Hickey, was convicted of one count of risk of injury to a minor in violation of Connecticut General Statutes 53-21; and of one count of sexual assault in the second degree in violation of Connecticut General Statutes 53a-71(a)(1). Petitioner was sentenced to a prison term of 8 years.

1. In July of 1988, the petitioner resided with his companion of many years, Mrs. Yvonne Smith. The complainant is the 15-year-old granddaughter of Mrs. Smith. The petitioner's conviction was based on charges that he had sexual intercourse with the complainant. The amended information under which the petitioner was charged alleged that this incident took place on or about July of 1988. The information was amended partially in response to petitioner's request that the State be required to allege a specific date on which the offense was to have been committed. The amended information charged that the offense was committed in July of 1988. The amended information was filed immediately preceding the start of trial at which time the petitioner objected to its lack of specificity and moved to dismiss the case. The trial court overruled the objection and denied the motion to dismiss to which the petitioner took timely exception. At trial, the complainant testified that she could not remember the date of the incident except to say that she thought it happened sometime during the summer of 1988.

On cross-examination of the complainant, defense counsel inquired of the complainant: "Now this incident that you told the ladies and gentlemen of the jury about, and Judge Sullivan, with Mr. Hickey, when did that happen? When did that take place?" The complainant responded: "Umm, what do you mean by that question? The first time? or the last time?" No curative action was taken by the court in response to this answer.

During deliberations, the jury requested the court to have the complainant's answer reread. The petitioner objected to the rereading of the complainant's answer to the jury because it was prejudicial and nonresponsive.

The court overruled the petitioner's objection to which the petitioner took timely exception. No evidentiary proceeding was held to determine the probative value of the testimony or its prejudicial effect. Upon rereading the complainant's answer, the court issued the following instruction to the jury:

"I can tell you that, however, the primary purpose of this, these proceedings is to determine whether or not the incidents took place in July of 1988. And while I will let you hear that portion of the testimony of the defendant (sic), inasmuch as it was given in response to a question asked by defense counsel, I would urge you not to give it any great weight, or draw any unreasonable inference from what it is you're about to hear."

Shortly after the answer was reread, the jury returned a verdict of guilty.

2. Petitioner appealed his conviction to the Appellate Court of the State of Connecticut which affirmed the conviction in a memorandum of decision released January 8, 1991. The Appellate Court held that the petitioner was not entitled to any greater specificity regarding the date of the charged offense because there was no evidence that the State could be more specific and the State was not required to give what it did not have.

The Appellate Court also held that the trial court was not required to issue a limiting instruction regarding the use of the complainant's answer when it was first given because none was requested and because evidence of prior acts of misconduct are admissible for limited purposes.

Further, the Appellate Court held that the trial court did not err in rereading the complainant's testimony and that the instruction it issued upon rereading it was correct in law.

3. The petitioner petitioned the Supreme Court of the State of Connecticut for certification which was denied on February 5, 1991.

REASONS FOR GRANTING THE PETITION

This case presents questions of fundamental importance to the administration of justice in both State and Federal Courts. These fundamental issues strike at the very heart of a criminal defendant's constitutional right to be apprised of the nature and cause of the accusations against him. Further, this case involves a criminal defendant's right to have vitiated the prejudice created by the introduction of evidence of prior uncharged acts of misconduct.

1. The Sixth Amendment to the United States Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; . . ."

In the instant case, the information charging the petitioner alleged that the crimes with which he was charged were committed on or about July of 1988. At trial, the petitioner moved for a more specific statement of the date and time the offense was alleged to have been committed

in order to establish an alibi defense if one were possible given a more specific date. A bill of particulars provides facts, in addition to those alleged in the indictment, that are necessary to apprise a defendant of the charges against him with sufficient precision to enable him to prepare for trial. *Wong Tai v. United States,* 273 U.S. 77, 82, 47 S. Ct. 300, 302, 71 L.Ed. 545 (1927). In the instant case, the court denied the petitioner's request for a more specific statement regarding the date and time of the charged offense.

In cases involving allegations of sexual offenses against minors, there is often a dirth of witnesses so that the case may rely entirely upon the credibility of the accused and the complainant. A defendant's need for specific information in such cases is, therefore, especially important. It is also true that the victims of such crimes may, due to their age, be unable to provide specific information. The Appellate Court resolved this uneasy tension between these competing social and legal interests by simply declaring that the State does not have a duty to disclose information which the State does not have. The burdens and difficulties created by the absence of information were assigned to the petitioner without explanation. The standard of review provided by the Appellate Court acted to deprive the petitioner of his Sixth Amendment right to be informed of the nature and cause of the accusations against him so as to enable him to prepare an adequate defense.

2. Evidence of prior uncharged crimes or acts is admissible for limited purposes. There is, however, a high probability that juries will make the improper inference of

presuming criminal disposition which requires courts to presume prejudice and exclude such evidence unless it can be admitted for some substantial, legitimate purpose. *Drew v. United States,* 331 F.2d 85, 89 (D.C. Cir. 1964). Evidence of uncharged acts of misconduct may be especially prejudicial in rape cases if limiting instructions are not given and, in order to vitiate this prejudice, the court should issue a limiting instruction, *sua sponte,* if necessary. *United States v. Sangrey,* 586 F.2d 1312, 1315 (1978). The Appellate Court stated that such evidence is admissible for limited purposes but ignored the fact that the complainant's answer was nonresponsive and was not offered for any purpose. As later events demonstrated, the jury relied on the complainant's answer in reaching its verdict. The Appellate Court ignored this prejudice by reasoning that no limiting instruction was requested so none was necessary. The Appellate Court's summary dismissal of this prejudice demonstrates the need for a clear standard by which state courts may identify such prejudice and take steps to cure it. The Appellate Court's review of petitioner's conviction was in derogation of the principles set forth in *Drew, supra* and *Sangrey, supra.*

3. Rule 404(b) of the Federal Rules of Evidence provides that:

"Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

This is an inclusionary rule which admits all evidence of other crimes (or acts) relevant to an issue in a trial except that which tends to prove only criminal disposition. *United States v. Masters,* 622 F.2d 83, 85 (4th Cir. 1980). The threshold requirements for admitting evidence of other crimes or acts is that the evidence be relevant to an issue other than the defendant's character and that its probative value is *substantially* outweighed by its prejudicial effect. *United States v. Lewis,* 780 F.2d 1140 (4th Cir. 1986).

The rereading of the complainant's answer to the jury was in complete derogation of Rule 404(b) and the principles set forth in *Masters, supra* and *Lewis, supra.* None of the permissible grounds for admitting evidence of prior crimes were in issue when the complainant volunteered this new allegation. Accordingly, the jury was allowed to consider the complainant's testimony as nothing more than evidence of criminal disposition. Further, the court never conducted a hearing to weigh the probative value of such evidence against its prejudicial effect. The very reason that the jury had requested the testimony to be reread was to consider whether the petitioner was predisposed to commit such a crime.

Once the trial court had decided to reread this testimony to the jury, and to issue a limiting instruction, it was duty bound to issue one which was specific as to the purpose for which said testimony could be considered. *United States v. Bach,* 588 F.2d 1283, 1287 (1979). The trial court did not mention any of the permissible purposes for which said evidence could be considered as found in Rule 404(b) nor did it explicitly instruct the jury not to

consider the complainant's testimony as evidence of criminal disposition. The trial court also confused the petitioner with the complainant. The limiting instruction should have been more explicit because the jury had already used the complainant's testimony in its deliberations without the benefit of any guidance from the trial court prior to requesting that it be reread. The Appellate Court's determination of the limiting instruction as correct in law was in contravention of the standards promulgated in *Bach, supra, Masters, supra,* and Rule 404(b) of the Federal Rules of Evidence.

CONCLUSION

Based upon the reasons stated herein, the Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

Petitioner
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APPENDIX

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2) Order on Petition for Certification to Appeal (2/5/91) 9A

3) Sixth Amendment to the United States Constitution 10A

4) Federal Rules of Evidence, Rule 404(b) 11A

STATE OF CONNECTICUT *v.* JAMES F. HICKEY (8729)

DALY, O'CONNELL and FOTI, Js.

Convicted of the crimes of risk of injury to a child and sexual assault in the second degree in connection with an incident involving a fourteen year old girl, the defendant appealed to this court. *Held:*

1. The trial court properly denied the defendant's motion for a medical examination of the victim, the defendant having failed to establish a nexus between the potential results of the examination and a material fact or issue involved in the case; because even slight penetration of the victim is sufficient to constitute the crime charged, evidence of the victim's virginity would not have been inconsistent with the defendant's guilt.
2. The defendant could not prevail on his claim that the trial court should have required the state to specify the exact date on which the crimes allegedly occurred, the defendant having failed to meet his burden of showing why a more specific date was required than the one month period alleged.
3. The trial court acted properly when it did not sua sponte strike the victim's testimony concerning uncharged sexual contact with the defendant or give a cautionary instruction to the jury.
4. The trial court did not abuse its discretion in granting the jury's request for rereading of certain portions of the victim's testimony and in cautioning the jury that a reference to uncharged sexual contact had nothing to do with the crime charged and that the jury should not give it great weight or draw unreasonable inferences from it.
5. The trial court correctly instructed the jury on the general principles of witness credibility and adequately and fairly addressed matters raised in the defendant's request to charge.

Argued November 2, 1990—decision released January 8, 1991

Substitute information charging the defendant with the crimes of sexual assault in the second degree and risk of injury to a child, brought to the Superior Court in the judicial district of Hartford-New Britain, geographical area number twelve, and tried to the jury before *Terence Sullivan, J.;* verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Edward J. Daly, Jr., with whom, on the brief, was *George A. Silvestri*, for the appellant (defendant).

Carolyn K. Longstreth, assistant state's attorney, with whom, on the brief, were *John M. Bailey*, state's attorney, and *Edward Wilson*, assistant state's attorney, for the appellee (state).

O'CONNELL, J. The defendant appeals from his conviction, after a jury trial, of one count of risk of injury to a child in violation of General Statutes § 53-21 and one count of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1). The defendant claims that the trial court improperly (1) denied his motion to require the victim to submit to a physical examination, (2) failed to require the state to specify the exact date of the offenses, (3) failed to strike the victim's reference to prior uncharged sexual contact with the defendant and to give, sua sponte, a limiting instruction to the jury immediately after the admission of evidence of prior misconduct, (4) allowed testimony to be reread to the jury, and (5) failed to grant his request to charge the jury on uncorroborated or vague testimony. We affirm the judgment of the trial court.

The jury could reasonably have found the following facts. The defendant lived with the fourteen year old victim's grandmother, whom the victim was visiting on the day of the crime. At a time when they were alone in the grandmother's apartment, the defendant partially removed the victim's clothing and engaged in vaginal intercourse with her.

I

The defendant first challenges the trial court's denial of his motion to require that the victim be medically examined to determine if at any time in her life, up until the time of the trial, she had engaged in sexual inter-

course. In support of his motion, the defendant argued that a physician from the University of Connecticut Medical Center had advised him that it was possible to determine virginity through a gynecological examination. Defense counsel also represented to the court that the victim's hymen was still intact in the opinion of a nurse practitioner who had examined her. The defendant argues that an intact hymen is a physical condition that is inconsistent with the victim's complaint.

The physician, however, did not testify and the argument of counsel is not a substitute for evidence. *State* v. *Franko,* 199 Conn. 481, 486–87, 508 A.2d 22 (1986). Although the nurse practitioner testified, she did not fulfill the defendant's expectations that she would state that the victim's hymen was intact. Instead, she testified that the victim's genitals were normal and not indicative of whether her vagina had been penetrated.

Moreover, our statutory and case law both provide that "[p]enetration, *however slight,* is sufficient to complete vaginal intercourse . . . ." (Emphasis added.) General Statutes § 53a-65 (2); *State* v. *Dubina,* 164 Conn. 95, 97, 318 A.2d 95 (1972). Accordingly, there was no showing that an intact hymen was inconsistent with the defendant's guilt. The defendant has failed to establish a nexus between the proffered evidence of virginity and a material fact or issue involved in the case. See *State* v. *Franko,* supra, 487. Phrased differently, he has not established a factual foundation for the relief requested. Therefore, the trial court properly denied the defendant's motion for a physical examination of the victim.

II

The defendant next claims that the trial court improperly refused to require the state to specify the exact date on which the crimes allegedly occurred. The sub-

stitute information charged the defendant with having committed the crimes "on or about July, 1988."

The victim was unable to recall the exact date and the law does not require the state to furnish information that the state does not have. *State* v. *Laracuente*, 205 Conn. 515, 519, 534 A.2d 882 (1987), cert. denied, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 913 (1988). A time period of one month was as specific as the evidence warranted and was more specific than has been found constitutionally sufficient in other cases. See *State* v. *Blasius*, 211 Conn. 455, 461, 559 A.2d 1116 (1989) (between January 1, 1985, and June 22, 1985); *State* v. *Laracuente*, supra, 521 (June or July, 1984). Our courts have consistently confirmed an information's constitutional sufficiency as long as the time period alleged has a distinct beginning and an equally clear end. *State* v. *Saraceno*, 15 Conn. App. 222, 237, 545 A.2d 1116, cert. denied, 209 Conn. 823, 824, 552 A.2d 431, 432 (1988). Although the state does have a duty to inform a defendant, within reasonable limits, of the time when the charged offense allegedly occurred, the state does not have a duty to disclose information that it does not possess. See *State* v. *Spigarolo*, 210 Conn. 359, 386, 556 A.2d 112, cert. denied, U.S. , 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989). The time period alleged in the present case meets this standard.

It is the defendant's burden to demonstrate why the precise date is necessary for the adequate preparation of the defense. *State* v. *Laracuente*, supra, 519. Difficulty in presenting an alibi defense without knowledge of the exact date does not warrant dismissal or the reversal of a conviction. *State* v. *Mancinone*, 15 Conn. App. 251, 257, 545 A.2d 1131, cert. denied, 209 Conn. 818, 551 A.2d 757 (1988), cert. denied, 489 U.S. 1017,

109 S. Ct. 1132, 103 L. Ed. 2d 194 (1989). The defendant did not meet his burden of showing why the exact date was required.

The substitute information in the present case satisfies the requirements of our law. Thus, the court properly refused to require the prosecution to state the date of the crimes with more specificity.

III

The third issue arises out of an answer the victim gave to a question posed by defense counsel on cross-examination. Some background is necessary to understand the setting in which the claim arose. The defendant was initially charged with two counts of sexual assault in the second degree and two counts of risk of injury to a child. At the start of trial, the state filed a substitute information charging the defendant with only one count of each of these crimes and dropped the other two counts. At the defendant's request, the court instructed the state not to refer to the incident represented by the dropped counts or to elicit testimony concerning it. The state complied with this instruction.

On cross-examination, defense counsel asked the victim when the incident she testified to on direct examination had taken place. The victim responded, "[W]hat do you mean by that question? The first time? Or the last time?"[1] After a sidebar conference, of which there is no record, defense counsel resumed his cross-examination.

[1] The complete colloquy is as follows:

"[Defense Counsel]: Now, this incident that you told the ladies and gentlemen of the jury about, and Judge Sullivan, with Mr. Hickey, when did that happen? When did it take place?

"[Witness]: Umm, what do you mean by that question? The first time? Or the last time?

"[Defense Counsel]: I mean the incident that you told us about. You told us . . .

The defendant argues that in the sidebar conference he moved to strike the victim's answer and the trial court denied the motion. We cannot consider any argument based on this conference because there exists no record of what took place.[2] This is the equivalent of an attempt to base an appeal on a judge's indication in chambers that he would deny a certain motion. No appeal is possible in that situation either. *State* v. *Gilnite*, 202 Conn. 369, 379, 521 A.2d 547 (1987); *Cohn* v. *Mt. Zion Baptist Church*, 130 Conn. 362, 366, 34 A.2d 129 (1943).

The defendant could have moved on the record to strike the comment but made a tactical decision not to do so in order to avoid highlighting it in the minds of the jurors.[3] The defendant cannot now complain because in hindsight his trial tactic may appear unwise. Not objecting to inadmissible evidence in order not to emphasize it to the jury is an accepted trial technique utilized by experienced litigators. When subsequent events reveal that it was an imprudent choice, however, the defendant is not entitled to turn the clock back and have us reverse the judgment because the trial court did not, sua sponte, strike the testimony and give the

"[Witness]: Oh, okay.

"[Defense Counsel]: That there was an incident, you described an incident that took place at your grandmother's house. But before I ask you that, let me have just a minute.

"[Defense Counsel]: May we approach the bench, Your Honor?

"The Court: Yes sir."

[2] Defense counsel ingenuously attempted to fill this lacuna by including his own affidavit in the appendix to the defendant's brief. Because an appellate court may not decide a case on matters dehors the record, we cannot consider the affidavit. *State* v. *Evans*, 9 Conn. App. 349, 352–53, 519 A.2d 73 (1986).

[3] We do not presume to indicate that the motion to strike would have to have been made in the presence of the jury. A common procedure of asking that the jury be excused and then moving to strike, in the jury's absence, might also have focused the jury's attention on the remark.

jury a cautionary instruction.[4] No limiting instruction was given at the time the victim made the remark in question and none was required because none was requested.

The trial court acted properly when it did not strike the testimony sua sponte or give a cautionary instruction.

IV

The defendant's fourth claim concerns the testimony that was read back to the jury. While trial counsel rarely learns whether he made the correct tactical decision in not objecting to inadmissible evidence during the trial, this was one of those rare cases where the success or failure of the strategy soon became evident.

During its deliberations, the jury requested that a portion of the victim's testimony be read back, including the victim's remark, "[W]hat do you mean by the question? The first time? Or the last time?" Testimony admitted without objection enters the case as part of the evidence and may be considered by the jury. *Derderian* v. *Derderian*, 3 Conn. App. 522, 528, 490 A.2d 1008, cert. denied, 196 Conn. 810, 811, 495 A.2d 279 (1985). The rereading of testimony lies within the broad discretion of the trial court. *State* v. *Rodriguez*, 10 Conn. App. 357, 360, 552 A.2d 1250 (1987). When the testimony was read back, the trial court gave a cautionary instruction that the earlier incident had noth-

[4] Defendant's reliance on *State* v. *Ouellette*, 190 Conn. 84, 459 A.2d 1005 (1983), is misplaced for three reasons. First, the testimony in *Ouellette* was deliberately elicited by the state rather than its being an inadvertent answer to a defense question and no limiting instruction was given at any time. Reversal is rarely warranted when an inadmissible answer is elicited by the defense. *State* v. *Nowakowski*, 188 Conn. 620, 623, 452 A.2d 938 (1982). Second, in *Ouellette* there was a proper record and, third, in *Ouellette* there was no indication that defense counsel, as a matter of trial tactics, was trying not to emphasize the remark.

ing to do with the crime charged and that the jury should not give it great weight or draw unreasonable inferences from it.[5] This instruction was correct in law and the trial court did not abuse its discretion in its handling of the request to read back the testimony.

V

Finally, the defendant complains that the trial court should not have denied his request to charge the jury on the subject of vague and uncorroborated testimony. The court's denial was proper because it gave an acceptable charge on the general principles of witness credibility.

We will not reverse a judgment where the trial court fails to adopt a request to charge if the matter is covered in the jury charge. In the present case, the charge adequately and fairly covered the matter addressed in the defendant's request and was a correct statement of the law. *State* v. *John,* 210 Conn. 652, 692–93, 557 A.2d 93, cert. denied, U.S. , 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989).

The judgment is affirmed.

In this opinion the other judges concurred.

[5] The instruction given the jury immediately before the testimony was read back was as follows: "We did find a small segment, which was in response to question by defense counsel. We're going to play that for you, because you asked to hear it. I can tell you that, however, the primary purpose of this, these proceedings is to determine whether or not the incidents took place in July, 1988. And while I will let you hear this portion of the testimony of the [victim], inasmuch as it was given in response to a question asked by defense counsel, I would urge you not to give it any great weight, or draw any unreasonable inferences from what it is that you're about to hear."

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-90-116

State of Connecticut

v.

James F. Hickey

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (23 Conn. App. 712), it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

/s/ Alan M. Gannuscio
Assistant Clerk – Appellate

Dated: February 5, 1991

Notice to: 2/5/91

Clerk, Superior Court, Hartford/New Britain at G.A. 12
Clerk, Appellate Court
Silvester, Daly & Delaney
Office of the Chief State's Attorney – Appellate Unit

Edward J. Daly, Jr. in support of petition; *Carolyn K. Longstreth,* Assistant State's Attorney, in opposition

CONSTITUTION OF THE UNITED STATES

SIXTH AMENDMENT

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Rule 404(b) of the Federal Rules of Evidence provides that:

"Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."